Public Prosecutor v Ang Ah Hoe

HIGH COURT (ALOR SETAR) — CRIMINAL APPEAL NO 42–22 OF 2008
ZAMANI A RAHIM JC
1 DECEMBER 2009

Criminal Law — Firearms (Increased Penalties) Act 1971 — s 8 — Possession of firearm and ammunitions — Whether accused had knowledge of pistol and ammunitions inside package — Discrepancies in evidence relating to package containing pistol and ammunition — Whether prima facie case of possession proven — Arms Act 1960 s 8(a)

Evidence — Adverse inference — Failure of prosecution to call material witness — Whether adverse inference should be drawn — Evidence Act 1950 s 114(g)

Evidence — Burden of proof — Fact especially within knowledge of party in civil case — Whether burden of proving that fact on party having requisite knowledge — Evidence Act 1950 s 106

Evidence — Confession — Admissibility of confession — Alleged confession made by accused after arrest — Whether warning administered — Whether purported confession admissible

The accused was a passenger of a taxi, driven by SP3. During the journey, the accused requested SP3 to stop in front of a shop to buy cigarettes and to wait for his friend. About five minutes later, a motorcycle ridden by a male Malay came and the motorcyclist passed a package to the accused. The accused took it and gave RM100 to the motorcyclist and placed the package in between his legs. At that moment a police party led by SP4 and assisted by SP6 surrounded the taxi and arrested the accused. A Llama pistol .32, five rounds of ammunition and an empty magazine was found in the package. The accused was indicted with two charges under s 8 of the Firearms (Increased Penalties) Act 1971 and s 8(a) of the Arms Act 1960 respectively for possession of a firearm and five bullets. At the close of the prosecution case the accused was acquitted and discharged without calling for his defence. The prosecution appeal against this decision.

Held, affirming the accused acquittal:

(1) Pursuant to s 106 of the Evidence Act 1950 ('the Act'), the burden was on the accused to show that he had firearm's licence, a fact peculiarly within his own knowledge. The trial judge erred in holding that the burden was on the prosecution to establish a negative assertion that the accused had no firearm licence (see para 8).

(2) There was no evidence or evidence that may be inferred that the accused had knowledge of the pistol and ammunitions in the package which was handed to him by the motorcyclist. He was in custody momentarily before it was seized by the police (see para 10).

(3) Failure to call the motorcyclist as a witness raised an adverse inference against the prosecution under s 114(g) of the Act (see para 11).

(4) The evidence that the accused allegedly confessed that the package contained pistol on being questioned at the time the package was first seized from the accused, was rejected. Since the accused was under arrest at that time and no warning was administered, the accused purported confession was inadmissible (see para 13).

(5) There was contradictions in the evidence of SP3, SP4 and SP6 relating to the exact place the package was seized from the accused and the colour of the package. There was doubt relating to the package and the doubt should be exercised in favour of the accused. The discrepancies were crucial because the package housed the main exhibits ie the pistol and ammunition, the subject matter of the charges (see para 14).

[Bahasa Malaysia summary

Tertuduh merupakan penumpang teksi yang dipandu oleh SP3. Dalam perjalanannya tertuduh meminta SP3 berhenti di hadapan sebuah kedai untuk membeli rokok dan menunggu kawannya. Kira-kira lima minit kemudian, sebuah motosikal yang ditunggang oleh seorang lelaki Melayu tiba dan penunggang motosikal tersebut menyerahkan satu bungkusan kepada tertuduh. Tertuduh mengambilnya dan memberikan RM100 kepada penunggang motosikal tersebut dan meletakkan bungkusan itu di antara kakinya. Pada ketika itu sepasukan polis yang diketuai oleh SP4 dan dibantu oleh SP6 mengelilingi teksi tersebut dan menangkap tertuduh. Sebuah pistol Llama .32, lima butir peluru dan sebuah majalah kosong ditemui di dalam bungkusan tersebut. Tertuduh didakwa dengan dua pertuduhan masing-masing di bawah s 8 Akta Senjata (Penalti Lebih Berat) 1971 dan s 8(a) Akta Senjata 1960 untuk milikan senjata api dan lima butir peluru. Di akhir kes pendakwaan tertuduh dibebaskan dan dilepaskan tanpa

pembelaannya dipanggil. Pihak pendakwaan merayu terhadap keputusan tersebut. A

Diputuskan, mengesahkan pembebasan tertuduh:

(1) Menurut s 106 Akta Keterangan 1950 ('Akta') beban adalah ke atas tertuduh untuk menunjukkan bahawa dia mempunyai lesen senjata api, suatu fakta yang hanya dalam pengetahuannya sendiri. Hakim perbicaraan khilaf dalam memutuskan bahawa beban adalah ke atas pihak pendakwaan untuk membuktikan pernyataan negatif bahawa tertuduh tidak mempunyai lesen senjata api (lihat perenggan 8). B C

(2) Tidak ada keterangan atau keterangan yang boleh disimpulkan bahawa tertuduh mempunyai pengetahuan tentang pistol dan peluru di dalam bungkusan yang diserahkan kepadanya oleh penunggang motosikal tersebut. Dia mempunyai milikan sejurus sebelum dirampas oleh pihak polis (lihat perenggan 10). D

(3) Kegagalan memanggil penunggang motosikal sebagai saksi membangkitkan inferens bertentangan terhadap pihak pendakwaan di bawah s 114(g) Akta (lihat perenggan 11).

(4) Keterangan bahawa tertuduh dikatakan mengaku bahawa bungkusan yang mengandungi pistol selepas disoal siasat pada masa bungkusan tersebut mula-mula dirampas daripada tertuduh, adalah ditolak. Oleh kerana tertuduh di bawah tahanan pada masa itu dan tidak ada amaran yang diberikan, pengakuan tertuduh tersebut tidak boleh diterima (lihat perenggan 13). E F

(5) Terdapat percanggahan di dalam keterangan SP3, SP4 dan SP6 berkaitan dengan tempat sebenar bungkusan tersebut dirampas daripada tertuduh dan warna bungkusan tersebut. Terdapat keraguan berkaitan dengan bungkusan dan keraguan tersebut harus memihak kepada tertuduh. Percanggahan tersebut adalah penting kerana bungkusan tersebut mengandungi ekshibit utama iaitu pistol dan peluru, iaitu perkara pertuduhan (lihat perenggan 14).] G

Notes

For a case on admissibility of confession, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 675. H

For a case on fact especially within knowledge of party in civil case, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 449.

For cases on failure of prosecution to call material witness, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 135–141. I

A For cases on Firearms (Increased Penalties) Act 1971 generally, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 678–684.

Cases referred to

Dominic Thomas v PP [2009] 2 MLJ 839; [2008] MLJU 839, HC (refd)
B *PP v Chee Kon Fatt* [1991] 3 CLJ 2564, HC (distd)

Legislation referred to

Arms Act 1960 s 8(a)
Evidence Act 1950 ss 106, 114(g)
C Firearms (Increased Penalties) Act 1971 s 8

Teoh Chin Chong (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Respondent in person.

D **Zamani A Rahim JC:**

[1] The accused was indicted with two charges of offences under s 8 of the Firearms (Increased Penalties) Act 1971 and s 8(a) of the Arms Act 1960
E respectively. The charges are as follows:

First charge

> Bahawa kamu pada 8.2.2006, jam lebih kurang 0950 hrs di hadapan kedai
F runcit Perniagaan Ramesh, No 36, Pekan Baru Changloon, di dalam Daerah Kubang Pasu, di dalam Negeri Kedah, telah didapati dalam milik kamu sepucuk senjata api jenis Llama.32 tanpa kebenaran yang sah dari mana-mana pihak. Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 8 Akta Senjatapi (Penalti Lebih Berat) Akta 37 Tahun 1971.

G

Second charge

> Bahawa kamu pada 8.2.2006, jam lebih kurang 0950 hrs di hadapan kedai runcit Perniagaan Ramesh, No 36, Pekan Baru Changloon, di dalam Daerah Kubang
H Pasu, di dalam Negeri Kedah, telah didapati dalam milik kamu 5 butir peluru (jenis.32MM) tanpa lesen yang dikeluarkan kepada kamu di bawah kehendak-kehendak Seksyen 4 Akta Senjata, Akta 206 Tahun 1960 dan boleh dihukum di bawah Seksyen 8(a) Akta yang sama.

I **[2]** The prosecution called nine witnesses to support its prima facie case. The accused was unrepresented. At the close of the prosecution case the

accused was acquitted and discharged without calling for his defence. Dissatisfied with the decision, hence this appeal. A

[3] The facts are as follows. The accused was a passenger of a taxi, PAE 6031 driven by SP3 from Bukit Kayu Hitam to Butterworth. SP3 stopped the taxi at Petronas petrol station, Pekan Changloon to refill petrol. Thereafter the accused requested SP3 to stop in front of Ramesh Sundry Shop at No 36, Pekan Baru Changloon to buy cigarettes and to wait for his friend. There the accused and SP3 waited in the taxi. B

[4] About 5–6 minutes, a motorcycle ridden by a male Malay came from the rear and slowed down. The said motorcyclist passed a package to the accused through the front window of the taxi. The accused took it and gave RM100 to the said motorcyclist. The accused placed the package in between his legs. All of a sudden, a police party led by SP4, assisted by SP6 and seven others surrounded the taxi. At the request of the police, the accused handed over the said package to SP4. The accused was arrested. He was taken to Changloon police station. And so too SP3 and his taxi. At the police station SP4 and SP6 examined the said package which was seized from the accused. The police found a Llama pistol.32, five rounds of ammunition, P9A–C and P8A and B and an empty magazine. The police too seized a black coloured holster. C D E

[5] SP4 then informed the recovery of firearms and ammunitions to SP8, the investigating officer of the case. SP8 kept the exhibits under lock and key at his office in Jitra. On 9 February 2008, SP8 handed over the Llama.32 pistol, the ammunitions, P9A–C and P8A and B to SP2, the armourer to test its serviceability. Having examined the said pistol, it was found to be in working condition. SP2 test fired three rounds of ammunition, P9A–C using the said pistol, it exploded and concluded that the firearm was serviceable. On 19 February 2008, SP2 handed over all the exhibits to SP8 who kept the same safely in his office. On 5 March 2008, SP8 delivered the exhibits to SP7, the storekeeper. F G

[6] Before the trial commenced the trial judge took upon herself to explain to the accused his right to cross-examine the prosecution witnesses' and the right to defend himself. A Chinese interpreter was provided to interpret the witnesses' evidence to the accused. The accused understood and wished to proceed with the trial without the services of counsel. H

[7] In her judgment, the trial judge set out three elements of the charge that needed to be proved by the prosecution. They were as follows: I

A (a) the accused was in possession of the pistol and ammunitions as stated in the first and second charge respectively;

(b) the accused had no licence to possess the said pistol and ammunitions; and

B (c) the pistol and five rounds of ammunition were 'firearm' and 'ammunitions' within their respective definitions of in the Firearms (Increased Penalties) Act 1971 and Arms Act 1960.

[8] I am of the view that the ingredient of possession of the firearm and C ammunitions by the accused is sufficient to dispose of the prosecution's appeal herein. As such I do not propose to deal with the other two ingredients, save that by reason of s 106 of the Evidence Act 1950, the burden is on the accused, and not on the prosecution, to prove a fact especially within the accused's knowledge. In this context, the burden is on the accused to D show that he has a firearm's licence, a fact peculiarly within his own knowledge. To that extent, I do not agree with the trial judge that the burden is on the prosecution to establish a negative assertion that the accused has no firearm licence. Refer to my judgment in *Dominic Thomas v Public Prosecutor* [2009] 2 MLJ 839; [2008] MLJU 839.

E

[9] As regards the ingredient of possession, the material witnesses for the prosecution were SP3, SP4, SP6 and to some extent SP3 (taxi driver). The trial judge wrote in her judgment at pp 14–15 as follows:

F Jika diteliti keterangan SP3, SP4 dan SP6 adakah tertuduh mempunyai milikan sepenuhnya ke atas barang kes tersebut. Dari segi fizikalnya memang bungkusan iaitu eksh P11 dirampas daripada tertuduh tetapi adakah tertuduh mempunyai pengetahuan apakah benda dalam bungkusan tersebut kerana ia baru sahaja menerima bungkusan itu daripada seorang penunggang motorsikal dan G meletakkan di celah kakinya dan ia belum sempat membuka bungkusan tersebut bagi melihat apa yang ada di dalamnya apabila pihak polis membuat serbuan. Bungkusan tersebut hanya dibuka di Balai Polis Changloon oleh SP4, SP6 dan anggotanya dan setelah dibuka barulah diketahui bahawa dalam bungkusan tersebut terdapat sepucuk pistol jenis Llama.32, lima butir peluru.32 mm, satu magazine kosong dan satu hoster. Tidak ada keterangan yang menunjukkan H bahawa semasa bungkusan itu diserahkan pada tertuduh ia ada pengetahuan mengenai isi bungkusan tersebut. Lagi pun pihak pendakwaan telah gagal untuk memanggil penunggang motosikal yang menyerahkan bungkusan itu sebagai saksi. Kegagalan ini mengakibatkan s 114(g) terpakai kerana ia merupakan saksi penting dalam kes ini.

I

[10] I am in agreement with the trial judge that there was not a morsel of evidence or evidence may be inferred that the accused had knowledge of the

pistol and ammunitions in the said package which was handed to him by the motorcyclist. He was in custody momentarily before it was seized by the police. The motorcyclist who delivered the said package to the accused was no doubt a material witness. According to SP3, the accused asked him to stop in front of Ramesh sundry shop to purchase cigarettes and to wait for his friend. In *Public Prosecutor v Chee Kon Fatt* [1991] 3 CLJ 2564 the facts are these. The accused was seated astride on a certain motorcycle. The cardboard box containing drugs was placed on the petrol tank of the motorcycle. At the material time, one Chee Swee Phang who was the accused's sister, was actually present at the scene. She was talking to the accused. According to D/Cpl Chettavelu she had actually attempted to dispose of the box and its contents. Edgar Joseph J was of the view:

> There is no doubt that she could have shed much light on the case had she been called and might have even filled in gaps in the prosecution case as to the *history* of the box ... So, her evidence could scarcely be considered unnecessary.

[11] In this case, the motorcyclist being the accused's friend, may certainly be able to shed much light on the case had he been called and provided the history of the package and its nexus with the accused. In *Chee Kon Fatt*'s case, though Chee Swee Phang was not called as a witness, His Lordship Edgar Joseph J did not draw adverse inference under s 114(g) of the Evidence Act against the prosecution because Chee Swee Phang was made available to the defence but the defence did not call her. Unlike the present case, the motorcyclist was not called to testify and he was not made available for the defence. Therefore, in the circumstances of this case, I agreed with the trial judge that failure to call the motorcyclist as a witness has raised an adverse inference against the prosecution under s 114(g).

[12] The trial judge went on to say in the next paragraph at p 15 of the appeal record as follows:

> Walaupun semasa memberi keterangan SP4 dan SP6 mengatakan mereka ada bertanya pada tertuduh apakah isi bungkusan tersebut semasa merampasnya dan tertuduh menjawab pistol tetapi pengakuan tertuduh tidak boleh diterima kerana tidak ada keterangan yang mengatakan amaran telah diberikan pada tertuduh dan catitan ada dibuat. Oleh itu, pernyataan daripada tertuduh yang mengatakan bungkusan itu mengandungi pistol tidak boleh diterima, oleh itu, jelas daripada keterangan saksi pendakwa SP3, SP4 dan SP6, tertuduh tidak mempunyai pengetahuan akan isi bungkusan yang dirampas daripada beliau. Oleh itu, pihak pendakwaan telah gagal untuk membuktikan elemen yang pertama iaitu elemen milikan.

A **[13]** I also agreed with the trial judge who rejected the evidence of SP4 and SP6 that the accused allegedly confessed that the package contained pistol on being questioned at the time the package was first seized from the accused. The ground of rejection was that no warning was given to the accused. On the facts of this case, it was obvious that the accused was under arrest at that B time. As there was no warning administered, the accused's purported confession or reply was inadmissible.

[14] There are other unsatisfactory features relating to the package containing the pistol and ammunitions. According to SP4, he seized the C package in between the accused's legs in the taxi. The package was white in colour. A member of the raiding party, SP6 stated in cross-examination that the package was seized in between the accused's legs and of firm conviction that the package was white in colour. Whilst SP3 (taxi driver) said the package was black in colour. Having shown the pictures on the plastic D package, P11, only then SP3 changed his testimony. The package was said to be white in colour. Therefore, there was contradictions in the evidence of SP3, SP4 and SP6 relating to the exact place the package was seized from the accused and the colour of the package. Was the package had been changed as suggested by the accused in his cross-examination of the prosecution E witnesses? It was the finding of the trial judge that there was doubt relating to the package and the doubt should be exercised in favour of the accused. The prosecution argued that the discrepancies were not material as they were related to the package and not the pistol and ammunition, the subject matter of the charge. The prosecution's contention was not accepted by the trial F judge as the discrepancies were crucial because the package housed the main exhibits ie the pistol and ammunition, the subject matter of the charges.

[15] Another unsatisfactory feature to which I agreed, was the missing of a piece of Carrefour advertisement paper where finger prints were found on it. G Anyway, according to SP9, the finger prints found on the said Carrefour advertisement paper were not on criminal record at his office registry. It is obvious that they were not the accused's finger prints.

H **[16]** In the upshot, I am in total agreement with the trial judge's ground that the accused had no knowledge and therefore possession of the pistol and ammunitions in the package at the close of the prosecution's case. The accused's acquittal is hereby affirmed.

I

Accused's acquittal affirmed.

Reported by Kanesh Sundrum